Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

MARK ANTHONY GILL,
Respondent.

On Petition For a Writ of Certiorari
To the Supreme Court of Missouri
– Capital Case –

PETITION FOR WRIT OF CERTIORARI

CHRIS KOSTER
Attorney General
SHAUN J MACKELPRANG
Chief Counsel, Criminal Div.
Counsel of Record
JAMES B. FARNSWORTH
Assistant Attorney General
P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Attorneys for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

Does a defendant's constitutional right to effective assistance of counsel, as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), require capital-defense counsel to conduct a pre-trial investigation into evidence that disparages the murder victim's character, even though such character evidence is presumptively inadmissible under state law?

PARTIES TO THE PROCEEDING

The petitioner, State of Missouri, was the respondent below. The respondent, Mark Gill, was the appellant.

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OPINIONS BELOW

The opinion of the Missouri Supreme Court reversing the motion court's judgment and sentence, filed December 1, 2009, and reported at 300 S.W.3d 225 (Mo. banc 2009), is reprinted in the Appendix ("App.") at A2-A18. The order denying petitioner's motion for rehearing is unreported. It is reprinted in the Appendix at A1.

JURISDICTION

The Missouri Supreme Court entered its judgment on December 1, 2009. The Court denied petitioner's motion for rehearing on January 26, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

This petition asks the Court to clarify whether a defendant's constitutional right to effective assistance of counsel requires capital-defense counsel to seek out and develop evidence to disparage the murder victim's character, even though such evidence is presumptively inadmissible under state law.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court enunciated a two-part test for evaluating a defendant's claim that he received constitutionally inadequate representation. *Id.* at 686-87. First, the defendant must show that counsel's performance was deficient—that is, that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* Second, the defendant must show that he was prejudiced by counsel's deficient performance. *Id.*

The Court stressed that the reasonableness of counsel's representation must be judged on the facts of the particular case, "viewed as of the time of counsel's conduct." *Id.* at 689-90. To fairly evaluate an attorney's performance, the Court explained, the reviewing court must make every effort "to eliminate the distorting effects of hindsight." *Id.* at 689.

Despite this Court's clear instruction that an attorney's performance must be evaluated from counsel's perspective at the time, the Missouri Supreme Court found that respondent's counsel was ineffective for failing to investigate and discover evidence relating to the victim's character that, although presumptively inadmissible, would have been valuable in hindsight because the State put the victim's character at issue during the penalty phase

at trial. *See* App. at A14-A16. Had the Missouri Supreme Court identified the correct constitutional standard—that counsel's performance must be measured from counsel's perspective at the time the challenged decisions were made—the Court would have had to conclude that counsel acted reasonably in deciding not to spend time looking for inadmissible evidence pertaining to the victim's character.

Respondent was convicted of first-degree murder for killing an acquaintance with whom he had been staying. *See State v. Gill*, 167 S.W.3d 184, 187-88 (Mo. banc 2005). After respondent discovered that the victim had a large amount of money in his bank account, he and an accomplice kidnapped the victim, forced him to turn over his ATM card and PIN, pushed the victim into a makeshift grave, and then shot him in the head. *Id.* When respondent was arrested, he had the victim's computer with him. He and his accomplice had used the computer to access funds from the victim's bank account.

Prior to trial, the State made the computer available to defense counsel for inspection. Defense counsel asked the prosecutor whether there was anything important to the case on the computer; the prosecutor said that there was not. Defense counsel also examined the State's report listing the names of the files on the computer, some of which were suggestive of sexually explicit content. Because respondent had never said anything to his attorneys about seeing pornography on the victim's computer, respondent's counsel did not believe that the pornography was relevant to respondent's case. App. at A19-A20. Thus, counsel decided not to spend time

examining the files on the victim's computer. App. at A19-A20.

Instead, counsel focused their investigation on respondent's background and mental health. Their investigator spoke with respondent's family members, interviewed respondent's former teachers and coaches, and collected respondent's medical, school, military, employment, and prison records. Counsel also retained an expert to evaluate the impact of respondent's difficult childhood on his development and decision-making capabilities. During the penalty phase of respondent's trial, respondent's counsel presented thirteen witnesses, including respondent's family, friends, and an expert in human development to describe how respondent's upbringing influenced his personality as an adult.

The State offered victim-impact testimony from several of the victim's relatives. App. at A14. Respondent's counsel objected, but the objection was overruled. App. at A14. Portions of the victim-impact testimony reflected well on the victim's character—for example, the victim's siblings testified that the victim was generous with his money. App. at A14.

After his trial was over, respondent discovered that the victim's computer contained sexually explicit "chat" transcripts and images depicting child pornography and bestiality. App. at A7-A9. Respondent filed a motion for post-conviction relief with the circuit court pursuant to Missouri Court Rule 29.15. App. at A2. He alleged, *inter alia*, that his trial counsel's decision not to investigate the contents of the victim's computer was objectively unreasonable. App. at A11. Respondent claimed that if counsel had discovered the sexually explicit

material on the victim's computer, counsel could have used the evidence in the penalty phase to rebut the State's characterization of the victim as a "saint" or to dissuade the State from using character evidence altogether. App. at A11.

The post-conviction court rejected respondent's claim of ineffective assistance of counsel. Citing *Strickland*, the court recognized that counsel's conduct was to be evaluated from counsel's perspective at the time. The court did not believe that reasonable counsel, in preparing for respondent's murder trial, would have felt it necessary to examine the victim's computer in search of illegal pornography with which to attack the victim's character. The court explained that "reverse victim impact" evidence—offered by the defendant to impugn the victim's character—would not have been admissible at the trial. Further, the court believed that neither respondent's counsel nor any reasonable attorney would have used the computer's contents to attack the victim's character even if it had been admissible. The court agreed with respondent's counsel's observation that it is generally bad strategy to "kick the [victim's] corpse," and found that counsel would have refrained from doing so to avoid alienating the jury. Thus, the motion court concluded that victim-character evidence such as the pornography on the victim's computer was of "such tenuous value that it is not reasonable to require an attorney to make such a search."

On appeal, the Missouri Supreme Court reversed. App. at A11-A17. The Court acknowledged that, under Missouri law, character evidence about the victim is generally inadmissible. App. at A13. But the Court found that because the State introduced victim-impact testimony that reflected well on the

victim, respondent was free to rebut that testimony with whatever evidence he could find to impugn the victim's character. *See* App. at A13-A14. Because, in this case, the State had "opened the door" to victim-character evidence, the Missouri Supreme Court believed that respondent's counsel was ineffective for failing to locate any damaging evidence about the victim's character prior to trial. *See* App. at A14-A17. The Court concluded that a reasonably competent attorney would have examined the contents of the victim's computer, discovered the child pornography, bestiality content, and sexually explicit chat transcripts thereon, and presented the evidence in rebuttal at the penalty phase. App. at A14-A17. The Court believed that if the jury had had "a different description of the victim" based on the explicit content on the victim's computer, there was a reasonable probability that the jury would have decided that respondent did not deserve the death penalty for the victim's murder. App. at A16-A17. Therefore, the Court vacated respondent's sentence and ordered a new penalty phase. App. at A17-A18.

REASONS FOR GRANTING THE PETITION

I. In analyzing whether defense counsel's failing to discover presumptively inadmissible pornographic files on the murder victim's computer was constitutionally deficient, the Missouri Court misstated the law set forth in *Strickland*, in that the Court ignored the requirement that the reasonableness of counsel's conduct must be evaluated from counsel's perspective at the time.

In *Strickland v. Washington*, the Court emphasized that when performance by defense counsel is challenged as deficient, counsel's conduct must be reviewed in light of counsel's perspective as it would have been at the time the purportedly unreasonable decisions were made. *See* 466 U.S. 668, 687-91 (1984). The Court expressly cautioned against relying on hindsight to evaluate whether an act or omission of counsel was objectively unreasonable:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id. at 689. The elimination of hindsight bias is a fundamental component of the law governing ineffective-assistance challenges. As this Court has explained, "in considering claims of ineffective assistance of counsel, '[w]e address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987)

(quoting *United States v. Cronic*, 466 U.S. 648, 665 n. 38 (1984)). And "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003).

In respondent's case, the Missouri Supreme Court ignored this Court's clear instruction that attorney performance must be evaluated independent of the "distorting effects of hindsight." In its recitation of the *Strickland* test, the Missouri Supreme Court correctly observed that counsel's performance is "deficient if it falls below an objective standard of reasonableness, as measured by prevailing professional norms." App. at A12. And the Court acknowledged the strong presumption that counsel's conduct was reasonable and effective—a presumption that is overcome only if the defendant shows that specific acts or omissions, in light of all the circumstances, fell outside the wide range of professional, competent assistance. App. at A12. But the Missouri Supreme Court omitted the requirement that its review of counsel's performance must relate to counsel's perspective at the time. *See* App. at A12. By ignoring this critical component of the *Strickland* test, the Missouri Supreme Court misstated the law.

The Court held that respondent's counsel's performance was deficient because counsel failed to discover sexually explicit material on the murder victim's computer. App. at A14-A16. According to the Court, counsel should have thoroughly examined the contents of the computer after receiving the report signaling that pornography was stored thereon. App. at A14-A15. The Court also criticized counsel for declining to interview the police detective who had

examined the computer. App. at A15. If counsel had conducted this additional investigation, the Court reasoned, they would have been prepared to rebut the State's character evidence regarding the victim's good character. App. at A15-A16.

But the Missouri Supreme Court's reasoning is faulty because it depends on hindsight—the Court found counsel's decision not to investigate the pornographic content on the victim's computer unreasonable only because, as it turned out, the evidence could have been used in rebuttal after the State managed to introduce presumptively inadmissible victim-character evidence over counsel's objection. At the time respondent's counsel decided not to examine the computer, they had no reason to believe that it contained relevant information, nor did they have reason to suspect that pornographic materials from the victim's computer would be admissible at trial to smear the victim's character. This Court has recognized that defense counsel's decision not to pursue a particular line of investigation is reasonable "precisely to the extent that reasonable professional judgments support the limitations on investigation." *Burger*, 483 U.S. at 794.

Nothing in defense counsel's pre-trial investigation suggested that the victim's computer would contain information relevant to respondent's case. Respondent had already confessed to the murders and admitted that his motive was to steal the victim's money. He never told counsel (or anyone else) that he had seen pornography on the victim's computer or that he suspected that the victim was a pedophile. Although the State made the computer available for inspection during discovery, the prosecutor told defense counsel that there was

nothing important to the case on the computer. The State also gave defense counsel a report cataloguing the files from the computer, which counsel reviewed. Respondent's counsel recognized that some of the file names suggested sexually provocative content, but noted that nothing in the report clearly indicated child pornography or obscenity. And, as counsel testified at the post-conviction evidentiary hearing, the possibility that the victim had pornography on his computer simply was not something they would be concerned about in preparing for respondent's murder case. App. at A19-A20.

Counsel's decision not to seek out information relating to the victim's character was consistent with prevailing professional norms. This Court has long recognized that "[p]revailing norms of practice as reflected in the American Bar Association standards and the like . . . are guides to determining what is reasonable." *Padilla v. Kentucky*, 559 U.S. ___, ___ (2010) (slip op., at 9). Indeed, the "norms" reflected in these guides are likely more stringent than the minimum level of professional competence needed to satisfy the Sixth Amendment, as "the standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice." *Padilla*, 559 U.S., at ___ (Alito, J., concurring in judgment, slip op. at 3). But even the most thorough and demanding standards detailing the responsibilities of capital-defense counsel do not recommend that counsel search the victim's background for evidence that may be used to smear the victim's character during penalty phase. *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, §10.7 (2003). Respondent's counsel's decision to spend their time developing other mitigating evidence was wholly

consistent with the practice and expectations of the legal community.

And more importantly, counsel's disinterest in whether the victim collected pornography on his computer was reasonable in light of Missouri law that makes evidence of a murder victim's character presumptively inadmissible. As the Missouri Court acknowledged in its opinion in this case, "[g]enerally, neither the State nor the defense may introduce character evidence about the victim in a murder case." App. at A13. If the State attempts to introduce evidence of the victim's good character during the penalty phase, defense counsel may either object to the introduction of the evidence or may allow the State to present the evidence and rebut it with negative character evidence. App. at A13-A14. The pornography on the victim's computer, relevant only insofar as it reflected badly on the victim's character, would thus have been presumptively inadmissible at respondent's trial. Defense counsel objected when the State attempted to present evidence of the victim's good character, but the objection was overruled. App. at A14. Defense counsel cannot be criticized for failing to predict that otherwise inadmissible evidence would become admissible rebuttal evidence at trial because the State, over counsel's valid objection, would be permitted to introduce evidence of the victim's good character.

But the Missouri Supreme Court found counsel's performance unreasonable precisely because counsel failed to make such a prediction. The Court held that respondent's counsel should have presented rebuttal evidence when the State introduced evidence regarding the victim's good character, and that counsel was unable to do so because they had failed to discover

the evidence on the victim's computer. App. at A14-A16. The Court's condemnation of counsel's decision not to investigate the pornography on the computer depends on the premise that the pornography was relevant and admissible at trial—a fact that became true only after the prosecutor put the victim's character at issue during the penalty phase, long after counsel's pre-trial investigation was complete. By relying on hindsight to judge counsel's performance, the Missouri Supreme Court effectively imposed a new constitutional requirement on defense counsel—that they must investigate and discover all evidence, even presumptively inadmissible evidence, if in the future the State may open the door to its admissibility. This Court should grant the petition to clarify whether the Constitution requires defense counsel to investigate not only relevant, admissible evidence, but also evidence that, at the time counsel is conducting its investigation, is presumptively inadmissible.

II. By relying on hindsight to conclude that respondent's counsel were ineffective, the Missouri Supreme Court effectively created a *per se* rule requiring capital-defense counsel to investigate evidence pertaining to a murder victim's background and character. Such a rule threatens to overburden counsel and to subject the families and friends of murder victims to painful and humiliating inquiries by the defense.

Since *Strickland* was decided, this Court has provided additional guidance regarding the minimum investigation that capital-defense counsel must conduct to have provided reasonably competent

assistance. For example, counsel is required to investigate the defendant's background in an effort to discover potential mitigating evidence. *See Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (holding that counsel performed deficiently because they failed to conduct an investigation that would have uncovered evidence of the defendant's "nightmarish childhood"); *see also Wiggins v. Smith*, 539 U.S. 510, 523-26 (2003) (concluding that counsel's representation was ineffective because they had limited their investigation to the defendant's presentencing investigation and social-services records even though the records revealed information suggesting that a more thorough investigation would be productive). Counsel must also examine the evidence that the State intends to use against the defendant at trial. *See Rompilla v. Beard*, 545 U.S. 374, 383-90 (2005) (holding that counsel acted unreasonably in failing to examine the State's file pertaining to one of the defendant's prior convictions when counsel knew that the State intended to use the prior conviction to prove an aggravating factor to support a death sentence).

These minimal standards notwithstanding, this Court has explicitly cautioned against the imposition of *per se* rules governing counsel's representation. In *Strickland*, the Court explained that a defendant complaining that his attorney was ineffective must show that the attorney's representation fell below an objective standard of reasonableness, adding that "[m]ore specific guidelines are not appropriate." 466 U.S. at 687-88. Indeed, the Court suggested that rigid requirements might themselves be unconstitutional, observing that "[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude

counsel must have in making tactical decisions." *Id.* at 689.

Further, the creation of *per se* rules requiring counsel to take particular investigative steps in every case may actually reduce the effectiveness of counsel overall. As Justice Kennedy observed in his dissenting opinion in *Rompilla*, "[t]he existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." 545 U.S. at 400 (Kennedy, J., dissenting). Rigid investigative requirements may also divert resources from other, more fruitful pursuits. *See id.* at 408 ("This rigid requirement [that defense counsel must examine every document in the defendant's prior conviction files] would divert counsel's limited time and energy away from more important tasks."). Each new requirement imposed upon capital defense attorneys "risks distracting attorneys from the real objective of providing vigorous advocacy as dictated by the facts and circumstances in the particular case." *Id.* at 402.

By holding that respondent's defense counsel provided ineffective assistance for choosing not to search the contents of the victim's computer for evidence that would reflect badly on the victim's character, even though the evidence would be admissible only if the State introduced evidence of the victim's good character, the Missouri Supreme Court effectively created a new *per se* rule governing capital-defense counsel's pretrial investigation. In light of the Court's decision, capital-defense counsel must now investigate the murder victim's background and character so that they will be prepared for rebuttal if the State introduces evidence of the victim's good character. It is no longer enough

for defense counsel to investigate and develop mitigation evidence from which counsel can argue that the defendant deserves to live; counsel must now also develop evidence with which they can suggest that the victim deserved to die.

Under the Missouri Supreme Court's new rule, counsel must investigate victim-character evidence even though such evidence will seldom be useful, even if it is admissible as rebuttal to victim-impact evidence. Often, defense counsel will want to avoid attacking the victim's character for strategic reasons. In the case at bar, respondent's counsel described the tactic as 'kicking the corpse," and testified, "[i]n penalty phase, you don't try and slam a victim by showing bad things that the victim may have done. That generally doesn't go over well with juries." App. at A19. Respondent's counsel opted for a different strategy, deciding to object (albeit unsuccessfully) to the admission of the State's positive character evidence. The post-conviction motion court concluded that counsel's strategy was reasonable, finding that no reasonable attorney would have seriously considered using the evidence on the computer to disparage the victim at trial, given the risks inherent in vilifying a murder victim. Nevertheless, the Missouri Supreme Court concluded that reasonably competent defense counsel would have investigated and discovered the pornography on the computer and, when the State introduced evidence of the victim's good character, would have used the pornography evidence in rebuttal. App. at A14-A17.

Thus far, it appears that the Missouri Supreme Court stands alone in declaring that capital-defense attorneys are obligated by the Constitution to search a victim's background for evidence that may later be

used to suggest that the victim's life had little value. But now that Missouri has announced that the "smear-the-victim" strategy is constitutionally mandated in cases where the State adduces victim-impact evidence, some capital-defense attorneys in other states will surely adopt the strategy in their own cases. National media reports highlighted the Missouri Supreme Court's holding that defense counsel should have attacked the victim's character with evidence that he was interested in illicit pornography. *See Court Overturns Death Sentence, Saying Defense Erred*, N.Y. TIMES, Dec. 2, 2009, at A20, available at http://www.nytimes.com/2009/12/02/us/02missouri.html (Last accessed Apr. 15, 2010); Editorial, *Victims' rights works both ways*, L.A. TIMES, Dec. 7, 2009, available at http://articles.latimes.com/2009/dec/07/opinion/la-ed-victims7-2009dec07 (Last accessed Apr. 15, 2010). As one California forensic psychologist noted in a blog entry shortly after the Missouri Supreme Court's decision issued, defense attorneys handling even "garden-variety" cases may be well-advised to search for evidence of a victim's sexual perversions so that they will be prepared to use the evidence at trial. *See* Karen Franklin, *Kiddie Porn: Risky to Ignore* (Dec. 6, 2009), http://forensicpsychologist.blogspot.com/2009/12/kiddie-porn-risky-to-ignore.html (Last accessed Apr. 15, 2010). If reporters and forensic psychologists across the country are cognizant of the effect that the Missouri decision may have on capital litigation, seasoned capital-defense attorneys in every jurisdiction are certainly also considering its implications. Capital counsel may now feel compelled to conduct their own investigations into victims' backgrounds in an effort to satisfy what they anticipate will be a new constitutional requirement for minimally effective representation.

Even though the Missouri Supreme Court is the first to declare that the Constitution requires capital defense counsel to seek out evidence to disparage a murder victim's character, the harm from the Court's decision will be ubiquitous and immediate. Capital-defense counsel nationwide are conducting their investigations in preparation for capital-murder trials and post-conviction proceedings. In light of the Missouri Supreme Court's decision, cautious counsel, in an effort to comply with minimal standards of effectiveness, will dig into their victims' backgrounds in search of evidence that might be used later in rebuttal if positive character evidence is presented by the State. This new standard in capital-case investigation will rarely help defendants, but will have a devastating effect on the victim's family and friends, who will be harangued by zealous investigators. In crafting a rule that requires capital-defense counsel to drag murder victims through the mud, the Missouri Supreme Court forgot this Court's admonition that "in the administration of criminal justice, courts may not ignore the concerns of victims." *Morris v. Slappy*, 461 U.S. 1, 15 (1983). The brutal murder of a loved one is torture enough for the surviving friends and relatives. Surely the Constitution does not require defense attorneys to exacerbate the survivors' pain by unearthing the most embarrassing personal details of the victim's life—especially because the evidence discovered during such an investigation will in most cases be inadmissible at trial.

The Missouri Supreme Court's rigid requirement that defense counsel must search the victim's background for disparaging character evidence is inconsistent with this Court's direction that specific,

detailed rules are inappropriate for evaluating whether counsel has provided constitutionally adequate representation. *See Strickland*, 466 U.S. at 687-89. The new rule will inevitably divert counsel's time and energy from worthier tasks and may ultimately result in less effective representation. In addition, the rule will often force defense counsel and their investigators to interrogate a murder victim's friends and relatives regarding the victim's character flaws—an exercise that is sure to needlessly inflict pain upon the survivors. This Court should grant the petition to make clear that the Constitution does not require that counsel expend their scarce resources searching for presumptively inadmissible evidence pertaining to the victim's character.

III. The Missouri Supreme Court's conclusion that defense counsel were ineffective for failing to investigate and discover the presumptively inadmissible character evidence on the victim's computer conflicts with cases in other jurisdictions stating that defense counsel will not be considered ineffective for failing to investigate and discover inadmissible evidence.

Although no jurisdiction outside of Missouri has squarely addressed whether capital-defense counsel is constitutionally obligated to search for evidence reflecting badly on the murder victim's character, other courts have held that counsel will not be deemed ineffective for failing to investigate inadmissible evidence. *See DeSchon v. State*, 197 P.3d 476 (Mont. 2008); *Cummings v. Sirmons*, 506 F.3d 1211 (10th Cir. 2007). The Missouri Supreme Court's holding in respondent's case is contrary to

the general rule recognized in *DeSchon* and *Cummings*. The Court should grant the petition to resolve the conflict.

In *DeSchon*, the Montana Supreme Court addressed whether the defendant's trial counsel provided ineffective assistance because he did not adequately investigate or present evidence that the victim had a propensity for violence. 197 P.3d at 478. Specifically, the defendant complained that his attorneys failed to speak with members of his family, who would have testified as to specific instances where the victim acted violently. *Id.* at 481. This evidence, the defendant argued, would have been relevant to support his "justifiable use of force" defense. *Id.* Defense counsel testified that they did not speak to the defendant's family about the victim's violent tendencies because, as they understood the law, evidence pertaining to the victim's violent past was admissible only to the extent that the defendant knew about it. *Id.* at 479, 481. The Montana Supreme Court noted that the defendant's attorneys' understanding of the law was correct—the undiscovered evidence of the victim's violent character was not admissible because the defendant knew nothing about it. *Id.* at 481. The Court concluded that the defendant's counsel "were not ineffective because they did not investigate and attempt to adduce inadmissible testimony." *Id.* at 481-82.

The Tenth Circuit Court of Appeals reached a similar conclusion in *Cummings*. *See* 506 F.3d at 1232-33. In an application for post-conviction relief, the defendant in Cummings argued that his trial attorneys had been ineffective in failing to investigate, discover, and use evidence of a state

witness's mental health history to impeach the witness's trial testimony. *Id.* at 1232. The Court of Appeals rejected the defendant's argument, noting that "it is far from clear that evidence of [the witness's] purported mental health history would have been admissible for purposes of cross-examination . . . ." *Id.* at 1233. For that reason, among others, the Court of Appeals concluded that the defendant had failed to satisfy either of the *Strickland* prongs. *Id.*

The Missouri Supreme Court's condemnation of respondent's counsel for failing to investigate, discover, and use presumptively inadmissible evidence conflicts with the decisions in *DeSchon* and *Cummings* recognizing that such investigation is not constitutionally required. This divergence among the lower courts' interpretation of the constitutional standard for minimally effective representation requires this Court's attention.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

CHRIS KOSTER
Attorney General

SHAUN J MACKELPRANG
Chief Counsel, Criminal Div.
Counsel of Record

JAMES B. FARNSWORTH
Assistant Attorney General

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Attorneys for Petitioner

APPENDIX

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[State Seal]
CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MO
65102

Thomas F. Simon
Clerk

Telephone
(573) 751-4144

January 26, 2010

Mr. James B. Farnsworth
Office of the Missouri Attorney General
P.O. Box 899
Jefferson City, MO 65102

In Re: Mark Anthony Gill, Appellant, vs. State of Missouri, Respondent
Missouri Supreme Court No. SC89831

Dear Mr. Farnsworth,

Please be advised the Court issued the following order on this date in the above-entitled cause:

"Respondent's motion for rehearing overruled."

Very truly yours,

THOMAS F. SIMON
s/ Cynthia L. Turley
Cynthia L. Turley
Deputy Clerk, Court en banc

cc:
Mr. William J. Swift

300 S.W.3d 225

SUPREME COURT OF MISSOURI
EN BANC

MARK GILL,
Appellant,

v.

STATE OF MISSOURI
Respondent.

No. SC89831

December 1, 2009
Rehearing Denied January 26, 2010.

Mary R. Russell, Judge.

Mark Gill was convicted of first-degree murder by a New Madrid County jury.[1] The jury recommended the death penalty, and the trial court agreed, sentencing Gill to death. This Court affirmed the conviction in *State v. Gill*, 167 S.W.3d 184 (Mo. banc 2005). Gill sought post-conviction relief by a Rule 29.15 motion, claiming prosecutorial misconduct and ineffective assistance of counsel. The motion court issued an order denying each of his claims. He appeals. Because the death penalty was imposed, this Court has jurisdiction of the appeal. Mo. Const. art. V, sec. 10; Order of June 16, 1988.

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[1] Along with first-degree murder, Gill was also convicted of armed criminal action, kidnapping, first-degree robbery, and first-degree tampering.

Among the issues in this case is whether Gill's counsel provided ineffective assistance of counsel by failing to review carefully the directory of the victim's computer, which contained child pornography, or by not interviewing or deposing the investigator who prepared the directory.

Although a victim's character is not typically an issue, when the State introduced evidence of the victim's good character in the penalty phase, Gill's counsel should have rebutted the State's good character evidence with the sexually explicit contents of the victim's computer. Because his counsel failed to discover the sexually explicit contents of the victim's computer, Gill's counsel were ineffective. This Court affirms the denial of the Rule 29.15 motion as to the guilt phase of the trial, but reverses the denial of the motion as to the penalty phase insofar as Gill had ineffective assistance of counsel for failing to investigate the victim's computer. The case is remanded.

I. Facts

A. Preparation for Trial

Defense counsel David Kenyon and Sharon Turlington did the majority of Gill's trial preparation, including reviewing the documents provided in discovery. Among the documents received were several reports authored by Lt. David James of the Cape Girardeau County Sheriff's Department. Lt. James prepared the probable cause statement, which stated that "[Gill] had [the victim's] computer in the car with him at the time of his arrest." Lt. James's name also appeared on several police reports as the supervisor giving other

officers investigative assignments. In addition, the State included Lt. James as a witness in the second amended information.

In addition to his work as the officer in charge of the investigation, Lt. James prepared a report, which was a listing of all the file folders or directories on the victim's computer.[2] Approximately a month prior to trial, the prosecutor sent defense counsel a copy of the report for their review.

The report included a list of instant message accounts and a list of the users with whom the accounts exchanged messages. User name "dogday_afternoon2002" exchanged messages with 16 other users: (1) "a_slutty18girl_w38c," (2) "blackstamina69," (3) "cherie_012," (4) "daddoesme15," (5) "elena_ita_girl," (6) "jbnrbi," (7) "jenny_cappa," (8) "kellieann1980," (9) "kelly1_15_1999," (10) "lilnichole14," (11) "lobowolf1960," (12) "msdiane69," (13) "sweet_tasting_slute," (14) "sweetgirl4older," (15) "sweetpiece123," and (16) "tiffyfreemont11."

Defense counsel reviewed the report prior to trial but did not notice anything that would have alerted them to the presence of pornography on the computer. In addition to reviewing the report, Gill's counsel spoke with the prosecutor about the computer's contents. Their discussions with the prosecutor focused on whether the computer

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[2] The victim's computer was relevant to the investigation and prosecution of the crime because, after the murder, Gill and his co-defendant, Justin Brown, used the computer to transfer $55,000 from one of the victim's accounts to an ATM-accessible account so that they could access the money.

contained (1) anything possibly incriminating and (2) any e-mails that implicated another potential defendant. The prosecutor assured defense counsel that there was nothing on the computer that he planned to use in the case or that implicated another potential defendant. Relying on the prosecutor's assertions, defense counsel decided to focus their attention away from the computer's contents.

B. Evidence About Victim Presented at Penalty Phase

The prosecutor presented five witnesses during the penalty phase of Gill's trial. Sgt. Eric Friedrich testified as to Gill's prior convictions. The other four witnesses, all relatives of the victim, testified as to how the victim's death affected their lives and to the victim's good character.

First, the victim's sister identified a family photograph album chronicling the victim's life. She also read her prepared impact statement to the jury and spoke about the victim's role in her life, including defending her against other children. She stated how proud the victim was of his daughter when she was born. She said that the image of him cradling his daughter when she was an infant reminded her of a "Mr. Mom." Additionally, she spoke about the victim's generosity with his money.

Second, the victim's brother-in-law testified about his relationship with the victim. The first day they met, the victim helped him push his car to a gas station. When he and his wife wanted to marry, the victim reassured their uneasy family about the couple's decision. The brother-in-law testified that he and the victim studied "the West, the mythical West,

and the true West, for years and years," including the characters who taught valuable life lessons, such as "[y]ou don't cheat at cards" and "you don't start any trouble, but you stand up to it when it comes."

Third, the victim's brother read a prepared statement to the jury. He recalled their childhood relationship and how the victim had helped him throughout their adolescent years. As adults, they kept in touch. During one visit, the brother learned that the victim was having serious financial problems because he had been generous with his money, including lending a friend money to pay for his wife's funeral. The brother concluded his statement by paraphrasing Abraham Lincoln's Gettysburg Address: "The world will little note, or long remember what we say here. But they will never forget what we did here." He said that this paraphrase described his memories of the victim.

Fourth, the victim's 17-year-old daughter testified. She told the jury of the impact of her father's death. She indicated that she stays awake at night thinking about how he was murdered. When asked about how her life will be different now that her father was murdered, she replied, "Some day I'm gonna graduate college, and he's not gonna be there to tell me how proud he is of me. And some day I'll get married, and I won't have my dad to walk me down the aisle and tell me how proud he is of me."

C. Post-Penalty Evidence

Lt. James testified at the Rule 29.15 hearing that he knew there was pornography on the computer within a few days of creating the report. Before Gill's trial, he looked at the transcript of the instant

message conversation about the 17-year-old daughter. Yet Gill's counsel testified that they chose not to interview or depose Lt. James. Defense counsel testified that while Lt. James was the officer in charge, they chose not to interview or depose him because he did not conduct the investigation himself and would be of little use at trial because his testimony would be hearsay.

Lt. James never told the prosecutor about the instant message conversation prior to Gill's trial because he did not think it was relevant to the case. In fact, the first time he told anyone about the computer's sexual contents was after Gill's trial when Brown's counsel asked about child pornography on the computer. Lt. James then told the prosecutor that the computer contained child pornography, bestiality content, and instant message conversations.

Prior to Brown's trial, his counsel requested a copy of the contents of the victim's computer and had its hard drive, including the Internet history, reviewed by a computer analyst.[3] The analyst testified at Gill's Rule 29.15 hearing as to his findings. The analyst used software to decode instant messages sent from and received by the victim's computer. On each of the instant messaging files, the profile "dogday_afternoon2002" was used. All six conversations were sexually explicit, and four of those conversations included references to sex with

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[3] Lt. James initially objected because it is a crime to disseminate child pornography, and the prosecutor opposed the request for the same reason. The trial judge, however, ordered the prosecutor to turn over a copy of the computer's contents for use by the defense expert.

underage girls. In one particular conversation, "dogday_afternoon2002" wrote about a 17-year-old daughter named Megan and described her as "5'7" ... 140 ... blonde hair ... blue eyes ... that tight teen girl ass ... 38c." The conversation goes on to describe Megan's anatomy in detail, and then "dogday_afternoon2002" says that he and Megan only do "touchy feely things, but I sure want more."

In addition to decoding the instant messages, the analyst also investigated the Yahoo! profiles found on the computer, including the "dogday_afternoon2002" profile. The basic information listed for the profile revealed the following information about the user: real name-Ralph, age-45, marital status-divorced, gender-male, and occupation-retired. The profile also revealed that the user's hobbies were "boating, fishing, camping, socializing with friends, drinking beer on my boat, Oh, and sex, all kinds, except I don't do men." The user also wrote in his profile that he has a new boat and to "come take a ride with me." Moreover, the user included a picture with his profile, which was an image of a white male from his navel to his feet with his penis exposed.

The analyst also found child pornography images and bestiality content on the victim's computer. The analyst described several of the child pornography images he found on the victim's computer. The pictures were of nude females who appeared to be younger than 18 in sexual poses. Some of the females were sexually developed, while others were sexually undeveloped.

Brown's defense counsel told the prosecutor about the sexual instant message conversations and the

picture of a white male from his navel to his feet with his penis exposed. At this point, the prosecutor filed a motion in Brown's case to exclude the computer's sexual content. His reasoning was that the computer's sexual content was irrelevant and that the defense could not attack the victim's reputation in the penalty phase. The trial judge ruled that the computer's sexual content would be excluded as irrelevant unless the penalty phase witnesses portrayed the victim as someone who "walks on water" or as a "saint."

At the penalty phase of Brown's trial, the prosecution did not present good character evidence about the victim that opened the door to the computer evidence. Although the same four relatives of the victim testified during the penalty phase of Brown's trial, their testimony was more restrained. The prosecutor alerted the witnesses not to cast the victim as a "saint." The sister did not speak about the victim's generosity with money. The brother-in-law did not talk about the character lessons he and the victim learned from the West. The brother discussed the victim's generosity with money but did not mention paying for the funeral of his friend's wife. The daughter's testimony was substantially the same in the penalty phase of both Gill's and Brown's trials.

A jury found Brown guilty of first-degree murder and kidnapping. The State pursued the death penalty, but the jury assessed life imprisonment without parole.[4]

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[4] Brown's sentence to life imprisonment cannot be attributed to different factual scenarios presented to the jury regarding who pulled the trigger to shoot the victim. In their

II. Standard of Review

This Court reviews whether the post-conviction motion court's findings of fact and conclusions of law are clearly erroneous. Rule 29.15(k). Findings and conclusions are clearly erroneous if, after reviewing the entire record, there is a " 'definite and firm impression that a mistake has been made.' " *Forrest v. State*, 290 S.W.3d 704, 708 (Mo. banc 2009) (quoting *Goodwin v. State*, 191 S.W.3d 20, 26 (Mo. banc 2006)).

III. Analysis

A. State's Failure to Disclose the Computer's Contents

Gill claims that the motion court clearly erred by not finding that the State committed a *Brady v. Maryland* violation by failing to disclose the contents of the victim's computer prior to trial. In *Brady*, the United States Supreme Court held that the State violates due process if it suppresses evidence that is favorable to the accused and material to either the guilt phase or the penalty phase. 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The State violates due process regardless of whether it withheld the evidence in good faith or in bad faith. *Id.*

Brady applies where, after trial, the defense discovers new information that the prosecution knew

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respective trials, both Gill and Brown claimed that the other pulled the trigger. *See State v. Gill*, 167 S.W.3d 184, 188 (Mo. banc 2005); *State v. Brown*, 246 S.W.3d 519, 524-25 (Mo.App.2008).

at trial. *State v. Salter*, 250 S.W.3d 705, 714 (Mo. banc 2008). If the defense knew about the evidence at the time of trial, no Brady violation occurred. Id. Here, a month before trial, the State disclosed the contents of the computer to defense counsel by sending a copy of the report, which listed all the computer's file folders or directories. Although defense counsel may not have thoroughly examined the report, they possessed it. There was no Brady violation, and the motion court's findings and conclusions regarding this point are not clearly erroneous.[5]

B. Ineffective Assistance of Counsel

Gill next alleges the motion court clearly erred by finding that he did not receive ineffective assistance of counsel because his counsel failed to discover the pornography on the victim's computer. He argues that his counsel could have used the evidence in the penalty phase either to rebut the State's characterization of the victim as a "saint"[6] or to dissuade the State from using character evidence altogether.

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[5] Gill also asserts a Rule 25.03(A)(9) discovery violation for the failure to disclose the computer's contents. Violations of discovery rules are usually outside the scope of a Rule 29.15 motion. *Merriweather v. State*, 294 S.W.3d 52, 55 (Mo. banc 2009). If the violation of the discovery rule implicates due process, then the Court may consider the violation in a Rule 29.15 motion. Id. Because no denial of due process took place here, Gill's claim is without merit.

[6] Along with presenting character evidence about the victim during the penalty phase, during the opening statement for the guilt phase, the prosecutor referred to the victim as a "Good Samaritan" who gave Gill a place to stay when he had nowhere to live.

To prove ineffective assistance of counsel sufficient to reverse a death sentence, the movant must establish the two prongs of the *Strickland v. Washington* test. 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the movant must establish that counsel's performance was deficient. *Id.* Counsel's performance is deficient if it falls below an objective standard of reasonableness, as measured by prevailing professional norms. *Id.* at 688, 104 S.Ct. 2052. There is a strong presumption that counsel's conduct was reasonable and effective. *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006). To overcome that presumption, the defendant must identify specific acts or omissions that, in light of all the circumstances, fell outside the wide range of professional, competent assistance. *Id.* Second, the movant must establish that counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Prejudice exists in a death penalty case if there is a reasonable probability that, but for counsel's deficient performance, the jury would have recommended life imprisonment rather than the death penalty. *Forrest*, 290 S.W.3d at 708.

1. Victim Impact Character Evidence

The trial court has broad discretion during the penalty phase to admit any evidence it deems helpful to the jury in assessing punishment. *State v. Gill*, 167 S.W.3d 184, 195 (Mo. banc 2005). The implication of the death penalty entitles the jury to evidence that may assist it in making its recommendation, including victim impact testimony. *See State v. Kreutzer*, 928 S.W.2d 854, 874 (Mo. banc 1996).

Victim impact evidence is admissible under the United States and Missouri Constitutions. *State v. McLaughlin*, 265 S.W.3d 257, 273 (Mo. banc 2008). Victim impact statements are another method of showing the jury the harm caused by the crime. *State v. Storey*, 40 S.W.3d 898, 908 (Mo. banc 2001). Such evidence illustrates that the victim's death represented a unique loss to the family. *Gill*, 167 S.W.3d at 195. Just as the defendant is allowed to present mitigation evidence showing he is a unique individual, the State is allowed to present evidence showing the victim's uniqueness as well. *Storey*, 40 S.W.3d at 909.

Not every piece of victim impact evidence must relate to the direct impact of the victim's death on the witness. *Gill*, 167 S.W.3d at 196. As this Court already decided in Gill's direct appeal, while portions of the victim impact evidence did not relate to the direct impact of the victim's death, the testimony was still proper. *Id.*

Generally, neither the State nor the defense may introduce character evidence about the victim in a murder case. *See State v. Hall*, 982 S.W.2d 675, 681 (Mo. banc 1998).[7]FN7 If the State attempts to introduce evidence of the good character of a victim in the penalty phase, defense counsel has two

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[7] If the defendant raises self-defense, the State may introduce evidence of the good character of the victim in a murder case. *See Hall*, 982 S.W.2d at 681. If so raised, "[a] victim's reputation for violence, turbulence, and aggression may be admissible." *State v. Gonzales*, 153 S.W.3d 311, 312 (Mo. banc 2005).

options. Defense counsel may object to the introduction of the character evidence. If defense counsel chooses this option, the trial court should sustain the objection and disallow the character evidence. Alternatively, defense counsel may, as a strategic maneuver, choose to allow the State to present the good character evidence of the victim. By doing so, the State opens the door for the defense to present rebuttal character evidence.

Here, the State introduced character evidence regarding the victim from family members' testimony.[8] The victim's sister testified as to the victim's generosity with money. The victim's brother-in-law testified about the victim's fascination with the characters from the Old West and the valuable life lessons those characters taught. The victim's younger brother testified about his relationship with the victim and the victim's generosity with what little money the victim had, including paying for a funeral for his friend's wife.

2. Gill's Counsel's Performance Was Deficient

When the State introduced evidence regarding the victim's good character, Gill's counsel should have presented rebuttal evidence. However, his counsel failed to present rebuttal character evidence because they failed to discover it. They saw the names of the sexually explicit files on the report but were not diligent in investigating further. Defense

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[8] Defense counsel objected by renewing his motion in limine to limit victim impact evidence to exclude good character testimony about the victim. The objection was overruled.

counsel testified at the Rule 29.15 hearing that after more carefully reviewing the report, they noticed entries that should have alerted them to the presence of pornography on the computer. They had the opportunity to discover the child pornography, bestiality content, and instant message conversations on the victim's computer but neglected to do so.

By failing to discover those files on the victim's computer, Gill's counsel's performance was deficient. A reasonably competent attorney would have carefully reviewed the report provided by the State and recognized file names like "a_sluttyl8girl_w38c" and "sweet_tasting_slute" as evidence of sexually explicit material on the computer. A reasonably competent attorney would have conducted further investigation as to the contents of the computer and discovered the child pornography images, bestiality content, and sexually explicit instant message conversations about the 17-year-old daughter. Then, a reasonably competent attorney would have rebutted the State's character evidence at the penalty phase.

Moreover, a reasonably competent attorney would have interviewed or deposed Lt. James, the investigator who prepared the probable cause statement and the report and who the State had listed as a potential witness. He knew the victim's computer contained sexually explicit material. If Gill's counsel had interviewed or deposed Lt. James about the report, they would have learned about the child pornography images, bestiality content, and sexually explicit instant message conversations on the victim's computer. Then, a reasonably competent attorney would have been able to rebut the State's

character evidence at the penalty phase. Gill's counsel were unprepared to rebut the State's character evidence of the victim and, therefore, their performance was deficient if the prosecutor still chose to introduce that evidence.

3. Gill Suffered Prejudice as a Result of Counsel's Deficient Performance

Although Gill's counsel's performance fell outside the wide range of professional, competent assistance, Gill must also establish that his counsel's deficient performance prejudiced him. If Gill's counsel had discovered the sexually explicit material on the victim's computer, they could have used the evidence in two ways. First, they could have used the sexually explicit material to persuade the prosecutor to limit the testimony to victim impact rather than to elicit positive character evidence. Second, Gill's counsel could have used the sexually explicit material to rebut the State's positive character evidence about the victim.

The jury would have had an alternative description of the victim when it deliberated whether to recommend the death penalty for Gill. There is a reasonable probability that, with the different description of the victim, the jury would have decided that, in its consideration of all of the evidence, the death penalty was not proper punishment for Gill. The reasonable probability of a sentence to life imprisonment rather than a sentence to death is highlighted by counsel's actions and the jury's decision in the later trial of Gill's co-defendant, Justin Brown. That Brown's jury recommended life imprisonment, not death, assists in showing a reasonable probability that, had Gill's counsel

discovered the computer's sexual content, Gill would not have been sentenced to death.

Because Gill has established that his counsel's performance was deficient and that he suffered prejudice as a result of their deficient performance, he has proven he received ineffective assistance of counsel during the penalty phase of his trial. The motion court's findings of fact and conclusions of law were clearly erroneous in finding otherwise.

C. Prosecutor's Negotiation Deception

Gill next claims that the motion court clearly erred in finding that the prosecutor did not engage in prosecutorial misconduct. He alleges that the prosecutor purposely misled defense counsel into believing the State would waive the death penalty if Gill provided information that would lead to the prosecution of another potential defendant. According to Gill, the prosecutor purposely misled defense counsel because he knew that the victim's family wanted the death penalty pursued regardless of his cooperation.

The State may not give misleading information to the defendant. *State v. Kilgore*, 771 S.W.2d 57, 65 (Mo. banc 1989). Here, however, the evidence presented at the Rule 29.15 hearing established that the prosecutor did not convey misleading information to the defendant. The prosecutor testified that he remained open to the possibility of a plea agreement throughout preparation for the case. The prosecutor believed that Gill had no information to implicate another defendant for the murder of the victim, but he still would have considered waiving the death

penalty had Gill provided him with information to charge the potential defendant with a serious crime. The prosecutor's actions did not mislead defense counsel into believing that he would waive the death penalty. The motion court's findings on this point are not clearly erroneous.

D. Lack of Independent Judicial Judgment

Gill finally claims that the motion court lacked independent judicial judgment when it signed the State's proposed findings of fact and conclusions of law. He argues that the findings and conclusions were contrary to how multiple witnesses testified at the Rule 29.15 hearing. Gill failed to preserve this issue for appellate review. Because the motion court was not given an opportunity to review this alleged error, the claim is not preserved for appellate review. *See State v. Kenley*, 952 S.W.2d 250, 260 (Mo. banc 1997). Further, Gill does not seek plain error review.

IV. Conclusion

The judgment is reversed as to the penalty phase insofar as Gill had ineffective assistance of counsel for failing to investigate the victim's computer. In all other respects, the judgment is affirmed. This case is remanded.[9]

All concur.

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[9] Gill raises other errors in regard to the penalty phase. Those points do not need to be discussed in light of this Court's remand for a new penalty phase.

[Excerpted testimony from the post-conviction-hearing transcript ("PCR Tr.")]:

(PCR Tr. at 172, lines 14-23).
[Trial counsel David Kenyon]: . . . [I]t's difficult to know exactly how [the evidence of pornography on the victim's computer] would have been used in trial, because we are in a precarious position as defense attorneys in this case because there's an expression, which seems like a callous expression, but it's very true and we use it in our trade, which is you don't kick a corpse. In penalty phase, you don't try and slam a victim by showing bad things that the victim may have done. That generally doesn't go over well with juries.

(PCR Tr. at 175, lines 2-25; 176, lines 1-7, 10-14).
[Trial counsel David Kenyon]: . . . I know we had had discussions with [the prosecutor] about whether there was anything on the computer that could possibly be incriminating to Mark Gill. My focus on the computer was really for the most part, I was focused on evidence that might exist within the computer that would hurt Mark Gill in the guilt phase. For example, if they found evidence on the computer, e-mails that Mark Gill may have sent to people indicating that he had premeditated this killing. Things along those lines are the things I was most concerned about and [the prosecutor] assured us there was nothing on the computer that he was planning on using in this case.

. . . .

Since the brunt of my concern was whether or not there was evidence in there that would incriminate Mark Gill, I felt comfortable when he said there was

nothing on the computer he was planning on using. I felt comfortable focusing my attention elsewhere.

(PCR Tr. at 178, lines 2-10).
[Trial counsel David Kenyon]: . . . [M]y focus just simply was not on whether there would have been pornography on the computer. I was really so very focused on trying to discover whatever incriminating evidence there might be on Mark Gill. When [the prosecutor] told me there was nothing on there he planned on using, there were enough things to do on the case that I probably would not have worried about it if there was some pornography on the computer.

(PCR Tr. at 192, lines 4-9).
Q [by State's attorney Ted Bruce]: . . . And during the many times that you interviewed and spoke to Mr. Gill, Mr. Gill never told you anything about there being any improper chat or any other type of communications on the computer involving [the victim] that he knew about?
A [by trial counsel David Kenyon]: No.

(PCR Tr. at 305, lines 20-25; 306, lines 1-3).
[Trial counsel Sharon Turlington]: . . . I would have no reason to think there would be child pornography or any kind of pornography on the computer. I mean, just really wouldn't be something that I would be concerned about, you know, specifically in this case.
Q [by State's attorney Ted Bruce]: Did Mark [Gill] ever tell you anything about pornography or child pornography being on that computer?
A: No.